STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 278567 Calhoun Circuit Court
ANTONIO DARNELL REED, Defendant-Appellant.	LC No. 07-000246-FH

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for possession with the intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 months to 240 months' imprisonment for the possession with the intent to deliver less than 50 grams of cocaine conviction and 365 days in jail for the possession of marijuana conviction with credit for 145 days, the two sentences to run concurrently. We affirm.

Defendant's first argument on appeal is that the prosecution presented insufficient evidence to convict him of possession with the intent to deliver less than 50 grams of cocaine because it failed to demonstrate a sufficient nexus between defendant and the cocaine to show possession and intent to deliver. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman, supra* at 428.

To support a conviction for possession with the intent to deliver less than 50 grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that defendant knowingly possessed the cocaine, (2) that defendant intended to deliver the cocaine to someone else, (3) that the substance was cocaine and that defendant knew it was cocaine, and (4) that the cocaine was in a mixture that weighed less that 50 grams. MCL 333.7401(2)(a)(iv); *People v Crawford*, 458

Mich 376, 389; 582 NW2d 785 (1998); see also CJI2d 12.3. Defendant does not dispute that the substance was cocaine, that he knew the substance was cocaine, or that the cocaine weighed less than 50 grams. Defendant disputes that he possessed and intended to deliver the cocaine to someone else.

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Constructive possession, which may be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence. *Id*. at 520. "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Id.* Rather, "some additional connection between the defendant and the contraband must be shown." *Id.* When the totality of the circumstances shows a sufficient nexus between the defendant and the narcotics, it can constitute constructive possession. *Id*. at 521; see also *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Constructive possession may be proved by circumstantial evidence and the reasonable inferences that can be drawn. *Hardiman*, *supra* at 428-431.

With regard to intent, "[a]ctual delivery is not required to prove intent to deliver." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). Intent may be proved from the facts and circumstances. *Id*. at 517-518. Intent to deliver can also be inferred from the quantity and packaging of the drugs and the circumstances of the arrest. *Hardiman*, *supra* at 422 n 5. Minimal circumstantial evidence is sufficient. *Fetterley*, *supra* at 518.

Viewed in a light most favorable to the prosecution, there was sufficient evidence at trial to enable a reasonable fact finder to conclude that defendant constructively possessed the cocaine. The cocaine at issue was found on top of the television, which was located directly in front of where defendant was sleeping with his girlfriend when they were both shot. The cocaine and several empty, clear, plastic, mini-zip baggies and a digital scale, which appeared to have cocaine residue on it, were in plain sight. And, defendant's girlfriend testified both that the cocaine was not there when she left for work and that it was not hers. Although she could not recall whether defendant was at her home when she left for work, she said defendant was the only person there when she returned and he was often there. Defendant indicated that he was shot where he resided. At one point defendant's girlfriend indicated that defendant had lived with her since October 2005. Six pairs of defendant's shoes were found in the bedroom. A reasonable fact finder could find by circumstantial evidence and draw reasonable inferences from the evidence that defendant knew the cocaine was there and had the right to exercise control over the cocaine in the bedroom of the home. *Wolfe*, *supra* at 520-521. Considering the totality of the circumstances and viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that a sufficient nexus existed between defendant and the cocaine to find constructive possession. *Id*. at 521; *Johnson*, *supra* at 500.

There was also sufficient evidence of the intent to deliver the narcotics. A police expert in the area of manufacturing and distribution of controlled substances testified that 12.48 grams of cocaine is a large quantity of cocaine; the several empty, clear, plastic, mini-zip baggies found next to the cocaine were the type commonly used to package cocaine for delivery; the digital

scale, which was next to the cocaine and which appeared to be well used, was of a type commonly used to weigh cocaine. Also, there was a shotgun in the bedroom closet where the cocaine was found, which is indicative of the need for protection where drugs are being sold. The expert further testified that, in his opinion, the quantity of cocaine, the packaging near the cocaine, the scale, and the weapon were all indications that the cocaine was not for personal use. Moreover, a brown paper bag containing a large sum of money was on the staircase leading to the bedroom and several hundred dollars were stolen from the bedroom at the time of the shooting. All of these facts are circumstantial evidence. The intent to deliver can be inferred from the circumstantial evidence and reasonable inferences drawn therefrom. Viewed as a whole and in a light most favorable to the prosecution, the evidence was sufficient for a rational fact finder to conclude that defendant possessed the cocaine with the intent to deliver.

Defendant's second argument on appeal is that he is entitled to a new trial because the prosecutor improperly argued during closing arguments that defendant's economic status was indicative of guilt. We disagree. This issue of prosecutorial misconduct is preserved; therefore, we review it de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). However, there are limitations. In *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980), the court stated:

> Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive. The probative value of such evidence is diminished because it applies to too large a segment of the total population. Its prejudicial impact, though, is high. There is a risk that it will cause jurors to view a defendant as a "bad man"—a poor provider, a worthless individual.
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> Other evidence of financial condition may, however, be admissible in the circumstance of a particular case.

Defendant's theory in this case was that nothing connected him to the drugs, and because nothing connected him to the drugs, there was no proof that he possessed or intended to deliver the drugs to anyone. Defendant's girlfriend, however, testified that it was defendant's money, several hundred dollars, which was stolen at the time of the shooting. But the challenged statements regarding defendant's unemployment were part of the argument and explanation connecting defendant to drug dealing and the requisite intent to deliver. The prosecutor was asking the jury to use their common sense in this regard, and not arguing that poverty was a motive for the crime. The prosecutor's comments were based on the evidence, reasonable inferences, and on common sense. As such, there was no prosecutorial misconduct. And, we note that the instructions the trial court gave that attorney statements are not evidence were sufficient to preclude any prejudice that might result from the prosecutor's remarks. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). "Jurors are presumed to follow their

instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003); see also *Unger*, *supra* at 235.

Defendant's final argument on appeal is that the trial court incorrectly scored offense variable (OV) 2, MCL 777.32(1)(d). Specifically, defendant argues that because he was acquitted of the weapons charges and the gun was unloaded and in a closet, there was no evidence to support the scoring of this offense variable. We disagree. A trial court's calculation of a sentencing guidelines range is reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Further, issues of statutory interpretation are reviewed de novo. *McLaughlin*, *supra*.

> In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [*Macomb Co Prosecuting Atty v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001) (citations omitted).]

"Offense variable 2 is lethal potential of the weapon possessed or used." MCL 777.32(1). The trial court scored OV 2 at five points. MCL 777.32(1)(d) provides that OV 2 be scored at five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." Although defendant argues that the trial court incorrectly scored OV 2 because defendant was found not guilty of the weapons charges, this argument ignores that a trial court's factual findings for purposes of sentencing are not subject to the same beyond the reasonable doubt standard required for a conviction. *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446 (2003), aff'd in part, vacated in part on other grounds 469 Mich 415 (2003). They need only be established by a preponderance of the evidence. *Id*.

There was adequate evidence to support the scoring decision. "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). "Physical possession is not necessary as long as the defendant has constructive possession." *Id*. at 471. Constructive possession of a weapon can be proved by either circumstantial or direct evidence. *Id*. at 469. Here, the bedroom closet door was open when police arrived, and the shotgun was clearly visible inside. And, the record evidence indicates that immediately before the shooting, defendant was in the bed asleep. The drugs that formed the basis of the conviction were in the same room. And, defendant stayed in the room on, at least, a semi-regular basis. Therefore, defendant was close to the shotgun, and it was reasonably accessible to him at the time of the crime for which he was being sentenced. In sum, there was evidence to find by a preponderance of the evidence that defendant constructively possessed the shotgun where he knew of the shotgun's presence, it was reasonably accessible to him, he was close to it and had the right to exercise control over it, even though other people also lived in, and had access to, the residence.

Further, we conclude that there is no merit to defendant's argument that because the shotgun was not loaded, OV 2 should not have been scored at five points. MCL 777.32(3)(c) defines "[p]istol", "rifle", or "shotgun" but does not require the weapon to be loaded. We also note that there was ammunition for the shotgun located in the same closet. The statute must be applied as written, and nothing should be read into the statute that is not within the intent of the Legislature. *People v Cook*, 254 Mich App 635, 640-641; 658 NW2d 184 (2003).

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly